No. 830

FEB 11 1946
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

ROYAL WAYNE REA, *Petitioner*

v.

A. McDONALD, Warden
of the Federal Correctional Institution
at Texarkana, Texas
Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

HAYDEN C. COVINGTON
Attorney for Petitioner

INDEX

SUBJECT INDEX

	PAGE
Number and title of cause ..... *Front Cover,*	1
THIS INDEX	i-v
Summary of matters involved	1
Preliminary statement	1
Opinion of the court below	2
Statutory provisions sustaining jurisdiction	2
Timeliness of this petition	2
Statutes and Regulations involved	2-3
Constitutional provisions involved	3
Questions presented	3, 4
Statement of form and history of action, and facts	5-8
How issues were raised	8
Specification of errors	9
Reasons relied on for granting the writ	9
Brief argument supporting petition	13-24
The petition for writ of habeas corpus alleged a cause for granting of the writ and the discharge of Rea from custody of the respondent	13
[A] There was a violation of petitioner's right to a judicial trial in the sentencing court by its refusal to permit petitioner to challenge the legality of the orders supporting the indictment contrary to the Fifth and Sixth Amendments to, and the bill of attainder clause of, the Constitution, which may be collaterally considered by a writ of habeas corpus, making it reversible error for the district court to deny the writ without hearing evidence on the petition	13
[B] There was a denial of petitioner's right to exemption from all training and service by the administrative agency contrary to the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution, which invalidated the indictment, giving no support to the judgment committing petitioner, so as to deprive the convicting court of jurisdiction to sentence petitioner under the Act	19
Conclusion	25

CITATIONS

Cases

PAGE

Billings v. Truesdell
321 U. S. 542, 554-555 1

Biron v. Collins
145 F. 2d 758 (CCA-5), reversing Collins v. Biron, 56 F. Supp. 357 24

Bonner, In re
151 U. S. 242, 257 17

Bowen v. Johnson
306 U. S. 19, 24 14

Cochran v. Kansas
316 U. S. 255 15

Dorsey v. Gill
148 F. 2d 857 14

Estep v. United States
No. 292 Oct. Term 1945, decided Feb. 4, 1946 2
Joint Brief for Petitioners:
pages 85-95 13
" 95-105 13
" 108-109 19
" 131-194 19
Appendix to Joint Brief for Petitioners, pp. 28a-57a, 71a-73a 19

Falbo v. United States
320 U. S. 549 1

Frank v. Mangum
237 U. S. 309, 331, 335, 347 ..... 14, 21

Gibson v. United States
No. 221 Oct. Term 1945, orally argued Jan. 2-3, 1946 2

Givings v. Zerbst
255 U. S. 11, 20 10

Goodwin v. Rowe
49 F. Supp. 703 24

Grimley, In re
137 U. S. 147 ..... 10, 21

Cases (continued)

PAGE

Hawk v. Olson
66 S. Ct. 116, 118-120 ..... 10, 14, 16

Holiday v. Johnson
313 U. S. 342, 350 ..... 10, 15

House v. Mayo
324 U. S. 42, 65 S. Ct. 517, 519, 521 ..... 9, 15, 16, 17

Hull v. Stalter
151 F. 2d 633 (CCA-7), decided Nov. 6, 1945 20

Johnson v. Sayre
158 U. S. 109 ..... 10, 21

Johnson v. Zerbst
304 U. S. 458, 468 ..... 14, 17

Jones v. Huff
— App. D. C. —, decided Nov. 26, 1945 14

Mayborn v. Heflebower
145 F. 2d 864 (CCA-5), cert. den. 65 S. Ct. 1087 24

McNally v. Hill
293 U. S. 131, 135-139 14

Mooney v. Holohan
294 U. S. 103, 112-113 17

Moore v. Dempsey
261 U. S. 86, 91 ..... 14, 17

Morrissey, In re
137 U. S. 157 ..... 10, 21

Powell v. Alabama
287 U. S. 52, 58 15

Reed, Ex parte
100 U. S. 13 ..... 10, 21

Rosier, In re
76 U. S. App. 214, 133 F. 2d 316, 322-324 14

Screws v. United States
65 S. Ct. 1031, 1038 17

Smith v. O'Grady
312 U. S. 329 ..... 14, 15

Cases (continued)

PAGE

Smith v. United States
No. 66 Oct. Term 1945, decided Feb. 4, 1946 10
Joint Brief for Petitioners:
pages 85-95 13
" 95-105 13
" 108-109 19
" 131-194 19
Appendix to Joint Brief for Petitioners, pp. 28a-57a, 71a-73a 19

Stewart, Ex parte
47 F. Supp. 410, 414 22-23

Tompkins v. Missouri
323 U. S. 485 15

United States ex rel. Arpaia v. Alexander
146 F. 2d 847 (CCA-2) 18

United States ex rel. Beye v. Downer
143 F. 2d 125 (CCA-2) 21

United States ex rel. Falbo v. Kennedy
141 F. 2d 689 (CCA-4), cert. den. 322 U. S. 745 17-18

United States ex rel. Lohrberg v. Nicholson
141 F. 2d 689 (CCA-4), cert. den. 322 U. S. 744 17

United States ex rel. Phillips v. Downer
135 F. 2d 521 (CCA-2) 21

United States ex rel. Trainin v. Cain
144 F. 2d 944 (CCA-2) 21

Ver Mehren v. Sirmyer
36 F. 2d 876, 882 (CCA-8) 10, 21-22

Waley v. Johnston
316 U. S. 101, 104-105 ..... 15, 18

Walker v. Johnston
312 U. S. 275 14-15

Williams v. Kaiser
323 U. S. 471, 472 15

Statutes

	PAGE
Judicial Code, sec. 240 (a), as amended by Act of February 13, 1925	2
Rules of the Supreme Court of the United States, Rule 38	2
Selective Service Regulations, secs. 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2, 633.21, 642.41, 642.42 (32 C. F. R. Supp. 601.5 *et seq.*)	3
United States Code:	
Title 28, secs. 451-464 ["Habeas Corpus Act"]	2-3, 14, 21
" 50, App. secs. 301-318 ["Selective Training and Service Act of 1940" as amended, secs. 3 (a), 5 (d), 10 (a), 11]	3, 19
United States Constitution	
Article I, sec. 9	13
Clause 2	3
Clause 3	3
Article III, sec. 2, Clauses 1-3	3, 13
Amendment V	3, 4, 13, 19, 20
Amendment VI	3, 13

Miscellaneous

Americana, Encyclopedia (1942), Vol. 13, pp. 602-604	14
Britannica, Encyclopædia (1942), Vol. 11, p. 53	14
Cooley, *Constitutional Limitations*, 8th ed., vol. 1, pp. 709-728	14
Holdsworth, *History of the English Law*, Vol. 9, pp. 108-125	14
Holtzoff, "Collateral Review of Convictions in Federal Court," Boston U. L. Rev., Jan. 1945, Vol. XXV, No. 1	15
Kent's Commentaries, 12th Ed. (Holmes) Vol. 2, pp. 32-42	14
Watson on the Constitution, Vol. 1, pp. 721-733	14

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■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Royal Wayne Rea, presents this petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The decision of the court in *Falbo* v. *United States* (320 U. S. 549) does not foreclose the questions presented here. Falbo failed to complete the selective process. Petitioner completely exhausted his administrative remedies by reporting for induction where, after completing the screening process given by the armed forces and being accepted for training and service, he refused to submit to induction. (*Billings* v. *Truesdell,* 321 U. S. 542, 554-555) With respect to the completion of the selective process, he stands in exactly the same position as do petitioners in

Smith v. *United States* (No. 66 October Term 1945) and *Estep* v. *United States* (No. 292 October Term 1945). The nullity of the administrative action can be reached by habeas corpus at any time after completion of the selective process regardless of whether or not the prisoner is held in custody by reason of the judgment of a civil tribunal based on the administrative order, or the judgment of a military tribunal assuming jurisdiction over the inductee by reason of the administrative order.*

2. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record. [25-27]**

3. *Statutory provisions sustaining jurisdiction.*

Jurisdiction of this court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

4. *Timeliness of this petition.*

The judgment of the circuit court of appeals was entered on January 12, 1946. [28] The petition for writ of certiorari is filed within three months from that date.

5. *Statutes and Regulations involved.*

Scope and effect of the Habeas Corpus Act (28 U. S. C.

*This petition presents to the court precisely the situation that was presented in the hypothetical question posed by Mr. Justice Douglas from the bench during the oral argument of *Gibson* v. *United States* (No. 221 October Term 1945, argued January 2 and 3, 1946). Moreover, the question presented here has since been decided favorably to petitioner by this Court in its opinion in the *Smith* and *Estep* cases on February 4, 1946. See also Reasons Relied On for Granting Writ, page 10, *infra*.

**Bracketed figures throughout this document denote pages of the printed record.

secs. 451-464) are involved. Also drawn in question is the construction and application of the Selective Training and Service Act of 1940, as amended, sections 3 (a), 5 (d), 10 (a), and 11 (50 U. S.C. App. secs. 301-318). Also involved are the Selective Service Regulations, sections 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2 633.21, 642.41, and 642.42 (32 C. F. R. Supp. 601.5 *et seq.*)* promulgated by the President under said Act.

6. *Constitutional provisions involved.*

Clause 2 of Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 of Section 9 of Article I prohibiting bills of attainder is invoked. Clauses 1-3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments are relied upon.

7. *Questions presented.*

(1) May the petitioner by writ of habeas corpus collaterally attack the judgment sentencing him to prison based on a conviction under an indictment charging petitioner with a violation of the Selective Training and Service Act by failure to submit to induction, after reporting as commanded, on the ground that the district court denied him the right to show the nullity of the order to report for and submit to induction, contrary to the due-process and bill-of-attainder clauses of the Constitution?

(2) Did the sentencing court's refusal to permit petitioner, who had exhausted his administrative remedies upon reporting for induction, to show that the orders supporting the indictment were void because petitioner was exempt from all training and service as a minister of religion constitute a denial of a judicial trial to petitioner contrary to

*The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

the due-process and bill-of-attainder clauses of the Constitution?

(3) Is the denial of a judicial trial in said manner by the sentencing court reviewable only upon direct appeal from the judgment of conviction and not collaterally by writ of habeas corpus?

(4) May the petitioner by writ of habeas corpus collaterally attack the judgment sentencing him to prison on the ground that the orders of the executive agencies supporting the indictment and judgment are void, irrespective of the right of petitioner to show the invalidity of such orders in defense to the indictment in the sentencing court because of guarantees of the writ of habeas corpus in the Constitution and the expansion thereof by the Statutes of the United States?

(5) Are the orders supporting the indictment and judgment sentencing petitioner void because issued in excess of authority, contrary to law, arbitrarily and capriciously, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment to the Constitution, inasmuch as the record before the administrative agency showed that petitioner was exempt from all training and service?

(6) Is petitioner a minister of religion exempt from all training and service under the Selective Training and Service Act and the Selective Service Regulations?

(7) Was it a violation of the procedure prescribed by the statutes implementing the writ of habeas corpus for the trial judge to deny the writ without a hearing and consideration of evidence on the ground that petitioner failed to raise any constitutional questions in the sentencing court and on the ground that the sentencing court considered all questions raised in the petition for the writ of habeas corpus, which findings by the trial court are unsupported by the record?

8. *Statement of case.*

FORM AND HISTORY OF ACTION

Petitioner instituted this civil action in the district court by filing a petition for writ of habeas corpus. [1] He alleged that he was illegally restrained of his liberty under commitment and judgment of the United States District Court for the Western District of Oklahoma, based upon an indictment charging him with refusal to submit to induction, contrary to Section 11 of the Selective Training and Service Act of 1940. [1-15]

After the petition was filed it was presented to the judge of the district court, who summarily denied the writ of habeas corpus, without a hearing on the petition. [19-20] The trial court held that facts alleged failed to state grounds for discharging the petitioner upon a writ of habeas corpus. [19-20] That decision was duly appealed to the court below. [20-22]

The court below concluded that although the facts in the petition for writ of habeas corpus were pleaded quite fully, taking them as true, there was no illegal restraint of petitioner, holding that he had been lawfully tried and convicted and that the alleged illegality of the administrative action could not be reached upon habeas corpus by petitioner who refused to submit to induction. The court held that such illegality could be determined by habeas corpus only after he had submitted to induction. [25-27]

FACTS ALLEGED

The petition stated that Rea was illegally restrained of his liberty by virtue of a judgment rendered and commitment issued by the court for the federal district of Oklahoma. [2, 16-17]

Petitioner alleged that he was indicted under the Selective Training and Service Act of 1940, being charged with willfully refusing to submit to induction as ordered by the armed forces after reporting for induction in ac-

cordance with that order issued by the local draft board. [2-3, 17-19] He claimed that the indictment, court proceedings, judgment and commitment in the district court were illegal and void because they were based upon an unconstitutional administrative order. [2-3, 8-11, 13] He also alleged that the court trying him under the indictment lost jurisdiction and authority to sentence him by reason of its denial of his right to show that the administrative order supporting the indictment was void and of no force and effect. [3, 13]

Rea showed that, after duly registering under the Act, he filed his Selective Service questionnaire, in which he proved that his occupation was that of an ordained minister of religion. [3-5] In the questionnaire it appeared that he devoted his full time to preaching as a missionary evangelist, establishing churches for the Watchtower Bible and Tract Society and Jehovah's witnesses, a recognized religious organization that had duly certified him to be an ordained minister of the gospel of God's kingdom. [3-4, 7-8] He claimed exemption from all training and service under the Act, requesting the board to classify him IV-D, the classification given ministers of religion pursuant to the Regulations and Section 5 (d) of the Act. [4] To his questionnaire he attached undisputed documentary evidence, corroborating his claim for exemption as a minister of religion, including a certificate of ordination from the legal governing body of Jehovah's witnesses, the Watchtower Bible and Tract Society. [4, 7-8]

Petitioner claimed that after he was classified as liable for training and service, denying his exemption, he requested a personal appearance, which was granted. [4] He asserted that the draft board was prejudiced against him and upon a personal appearance refused to permit him to offer full evidence of his exempt status, denying a fair hearing, by reason of which he was deprived of his procedural rights to make a complete record for consideration

by the board of appeal contrary to the due process clause of the Fifth Amendment. [4] He further alleged that upon a continuance of the classification making him liable for training and service, he duly appealed to the board of appeal, and while the case was before the appeal board he was requested to appear for another hearing before the local board. [4-5] Although he appeared and offered evidence, the local board members displayed such prejudice and bias that he was not adequately afforded opportunity to fully present evidence for the written record to be forwarded to the board of appeal for its consideration, and that the local board withheld evidence from the board of appeal by failing to make a complete written record of the evidence offered at such hearing. [5]

The board of appeal, upon *de novo* consideration of the Selective Service record, classified petitioner I-A, making him liable for training and service in the armed forces. [5] Upon a request duly made by petitioner, the Director of Selective Service refused to take further action in behalf of petitioner, or to review the action of the draft boards. Thus the remedies of petitioner within the administrative agency, in his effort to obtain the exemption from training and service, were completely exhausted. Thereafter, he having been previously declared acceptable by the armed forces upon a preinduction physical examination, he was ordered to report for induction on June 27, 1944. He reported and completed the army's screening process at Fort Sill, Oklahoma. He was again accepted for training and service, thereby exhausting any possibility of his being rejected for training and service. [5-6]

Petitioner alleged that the order commanding him to do training and service, and the action of the administrative agency denying his claim for exemption, were contrary to law, contrary to the undisputed evidence, in excess of authority of the administrative agency, wholly without support of any evidence showing that he was not exempt and

that he was liable for training and service, arbitrary and capricious, and in violation of the due process clause of the Fifth Amendment to the Constitution. [5, 8-10]

Petitioner further alleged that after being accepted by the armed forces for training and service upon his reporting for induction as ordered, he refused, when ordered, to submit to induction. [6] Thereafter, as alleged, he was charged with the violation of the Selective Training and Service Act for refusing to submit to induction. [2, 3, 6, 10, 17-19] Upon a trial to a jury in the district court at Oklahoma City, the trial judge is alleged to have illegally excluded from evidence the draft board file showing the unlawful and unconstitutional action of the draft board, and the testimony of petitioner. [10] Said trial judge held that the illegality of the administrative order could not be challenged in defense to the indictment and, as alleged, instructed the jury that the classification and order of the boards were unimpeachable by petitioner, conclusive upon the court and jury, and that the alleged illegality could not be considered in defense to the indictment, contrary to petitioner's request that the jury be instructed that they could consider the illegality of the orders. [10-11] Petitioner claimed that this action of the trial judge in excluding evidence and in charging the jury violated the rights of petitioner to a judicial trial and the right of trial by jury, contrary to the bill of attainder clause of the Constitution and the Fifth and Sixth Amendments thereto. [11]

Petitioner further alleged that after he was sentenced an appeal was duly taken, which was afterward dismissed because of the failure to perfect the record. [12] Petitioner also alleged that he desired to make good his allegations by proof upon a hearing before the trial court below. [14]

9. *How issues were raised.*

The issues were raised by petition for writ of habeas corpus, and the order by the court below denying the writ. [1-20]

Specification of Errors

(1) The courts below erred in holding that the petition did not allege a cause for issuance of the writ of habeas corpus and the discharge of petitioner.

(2) The courts below erred in holding that upon the trial of the indictment there was no violation of the constitutional rights of petitioner so as to oust the court of jurisdiction to impose sentence upon petitioner.

(3) The courts below erred in failing to hold that the administrative orders supporting the indictment were unconstitutional and void so as to vitiate the judgment and commitment against petitioner.

(4) The trial court erred in denying the petition, without hearing evidence, because the ground for denial of the writ of habeas corpus was that the petitioner waived the violation of his constitutional rights through failure to urge his constitutional grounds upon the trial of the indictment, which holding was not supported by the record.

Reasons Relied on for Granting the Writ

The questions presented here are of great importance, showing grave error committed by the courts below. In deciding that the district court did not commit error upon denial of the writ of habeas corpus without receiving evidence, a decision was rendered in conflict with applicable decisions of this court on habeas corpus proceedings. (*House* v. *Mayo*, 65 S. Ct. 517, 519, 521) It should be remembered that the trial court found that petitioner waived his rights before the sentencing court through failure to raise any constitutional question in defense to the indictment. [20] This finding of the court was unsupported by evidence, if not contrary to the record. Nowhere in the record can it be inferred that petitioner failed to raise constitutional questions before the sentencing court. [1-15] This holding,

without giving petitioner an opportunity to prove that he had not waived any of his constitutional rights, is contrary to *Hawk* v. *Olson*, 66 S. Ct. 116, 118-120. See also *Holiday* v. *Johnson*, 313 U. S. 342, where it is stated: "A petition for writ of habeas corpus ought not to be scrutinized with technical nicety."

The holding of the courts below, that the petition for writ of habeas corpus could not go behind the judgment of conviction and reach the alleged invalidity of the administrative order, is contrary to the applicable decisions of this court in *Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Givings* v. *Zerbst*, 255 U. S. 11, 20.

The decision of the court below is in direct conflict with the decision of this court in *Smith* v. *United States*, No. 66 October Term 1945, and *Estep* v. *United States*, No. 292 October Term 1945, rendered February 4, 1946. See pages 7 and 8 of the slip opinion of the Court (Mr. Justice Douglas) and the concurring opinion by Mr. Justice Rutledge. Moreover, said decision of the circuit court of appeals in this case is in conflict with the decision of the circuit court of appeals (Eighth Circuit) on substantially the same question: *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 882.

If this court does not find any conflict between the decision of the court below and applicable decisions of this court, or the aforementioned decision of the Eighth Circuit Court of Appeals, then, as an alternative reason for granting the writ of certiorari, petitioner claims that the court below has decided an important question of federal law which has not been, but should be, settled by this court.

In any event, petitioner says that this court ought to review the decision of the court below, because it has so far departed from the accepted and usual course of judicial proceedings, and also sanctioned such departure by the district court, as to call for an exercise of this court's power of supervision.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

ROYAL WAYNE REA, *Petitioner*

By HAYDEN C. COVINGTON, *His Counsel*

BRIEF ARGUMENT SUPPORTING PETITION

The petition for writ of habeas corpus alleged a cause for granting of the writ and the discharge of Rea from custody of the respondent.

A

There was a violation of petitioner's right to a judicial trial in the sentencing court by its refusal to permit petitioner to challenge the legality of the orders supporting the indictment contrary to the Fifth and Sixth Amendments to, and the bill of attainder clause of, the Constitution, which may be collaterally considered by a writ of habeas corpus, making it reversible error for the district court to deny the writ without hearing evidence on the petition.

Inasmuch as denial to one charged by indictment with the offense of refusal to submit to induction, after completing the screening process prescribed by the army whereby he is accepted by the armed forces for training and service, of his right to challenge the validity of the administrative order supporting the indictment, has been already so thoroughly argued at length, both orally and in writing, by counsel, it will be an undue burdening of the court to repeat such argument here. Petitioner asserts that the denial of such defense against the indictment violated his rights to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution. (See Joint Brief for Petitioners in *Smith* v. *United States,* No. 66 Oct. T. 1945, and *Estep* v. *United States,* No. 292 Oct. T. 1945, pages 85-95.) Moreover, petitioner claims that the denial of his rights to show, in response to the indictment, that the administrative order was invalid, is prohibited by Article I, Section 9, clause 3, of the Constitution. *Ibid.,* pp. 95-105.

Upon presentation of a petition for a writ of habeas corpus it is the duty of a district court to inquire "into the cause of restraint of liberty". (28 U. S. C. 452) It is the duty of the court to "dispose of the party as law and justice requires" after a hearing of the writ of habeas corpus. (28 U. S. C. 461) The truth and substance of the causes of detention must be inquired into by the court. (*Frank* v. *Mangum,* 237 U. S. 309, 331) The inquiry upon the hearing of a petition for a writ of habeas corpus has been expanded and liberalized by the implementing statutes. *Hawk* v. *Olson,* 66 S. Ct. 116, 118; *Walker* v. *Johnston,* 312 U. S. 275, 285; *Smith* v. *O'Grady,* 312 U. S. 329.*

While ordinarily a judgment and commitment under which a prisoner is detained is impervious to collateral attack on habeas corpus, if during the trial under an indictment the prisoner's constitutional rights were so far denied him, the sentencing court loses jurisdiction so as to permit full inquiry upon the petition for writ of habeas corpus. *Bowen* v. *Johnson,* 306 U. S. 19, 24; *Frank* v. *Mangum,* 237 U. S. 331, 335, 347; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v.

*Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally* v. *Hill,* 293 U. S. 131, 135-139, to which reference is here made. See also Holdsworth, *History of the English Law,* vol. 9, pp. 108-125; *Encyclopædia Britannica,* 1942, Vol. 11, p. 53; *The Encyclopedia Americana,* 1942, Vol. 13, pp. 602-604; Cooley, *Constitutional Limitations,* 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution,* Vol. 1, pp. 721-733; *Kent's Commentaries,* 12th ed. (Holmes), Vol. 2, pp. 32-42; *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324. Cf. *Dorsey* v. *Gill,* 148 F. 2d 857, with which consider *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia on November 26, 1945 (14 Law Week 2335-2336), holding that the trial court erred in dismissing a petition for writ of habeas corpus on the ground that the alleged denial of due process by the trial judge upon the trial was preposterous, unbelievable and insufficient so as not to require a hearing.

Johnston, 312 U. S. 275, 286; *Waley* v. *Johnston,* 316 U. S. 101, 104; *House* v. *Mayo,* 324 U. S. 42.*

It is clear that the petitioner strongly overcame the presumption of irregularity of the trial and proceedings under the indictment. If the trial court had permitted a hearing of evidence upon a writ of habeas corpus, petitioner would have established by testimony all the allegations of the petition, showing that the administrative orders, the indictment, the judgment and commitment were void and that the district court lost jurisdiction through gross violation of his constitutional rights. It was especially harmful for the trial court to hold, in the face of the pleadings, that petitioner waived his right to challenge the invalidity of the proceedings before the sentencing court, because of his failure to assert there his constitutional objections. The pleadings do not show that he failed to raise his constitutional objections upon the trial of the indictment. The trial court improperly indulged in intendments against the petition and read into it matters which had not been alleged and which could not fairly be inferred from the allegations in the petition. Moreover, the trial judge illegally scrutinized the petition with a technical nicety. (*Holiday* v. *Johnson,* 313 U. S. 342, 350) He should have permitted the petitioner an opportunity to offer evidence as to the pleadings upon the trial of the indictment, in order to show the truth as to what actually took place upon the trial of the indictment. The petitioner could not plead all the evidence and the entire record made before the sentencing court. Indeed, he requested the court to issue a subpoena duces tecum and a writ of certiorari to the clerk of the district court at Oklahoma City in order to prove by the record the proceedings had upon the trial

*See also *Smith* v. *O'Grady,* 312 U. S. 329, 333; *Williams* v. *Kaiser,* 323 U. S. 471, 472; *Tompkins* v. *Missouri,* 323 U. S. 485; *Cochran* v. *Kansas,* 316 U. S. 255; *Powell* v. *Alabama,* 287 U. S. 52, 58; Holtzoff, "Collateral Review of Convictions in Federal Court," Boston Univ. L. Rev., January 1945, Vol. XXV, No. 1.

of the indictment. [14] Petitioner was ready and willing to discharge the burden that the law imposed upon him, in making a collateral attack on the judgment and commitment whereby he was restrained of his liberty. It is true that he "must prove his allegations, but he is entitled to an opportunity." *Hawk* v. *Olson*, 66 S. Ct. 116, 120.*

In *House* v. *Mayo*, 324 U. S. 42, 65 S. Ct. 517, the district court denied a petition for writ of habeas corpus without calling for a return and without a hearing, which is the same action taken by the district judge in this case. In the *House* case the "district judge did not consider whether this deprivation of constitutional right is remediable in a federal habeas corpus proceeding". (65 S. Ct., at page 519) Moreover, in the *House* case, as here, the district judge was of the opinion that the prisoner "has had a full, complete and competent consideration and decision in the Supreme Court of Florida of all the various matters here sought again to be presented." In the *House* case the Supreme Court of Florida did exactly as it is alleged that the District Court of the Western District of Oklahoma did concerning Rea's claim that the administrative action was void, that is to say, the court without considering the merits of Rea's "contentions and without affording a hearing on the merits, denied relief to petitioner, on the ground that the particular remedy sought was not the appropriate one under Florida law to raise those contentions." Since the trial court in the case at bar did not decide whether the constitutional rights of Rea had been denied by the district court and the draft boards but denied the petition on the grounds that it was an attempt to re-try the same issues raised and considered by the district court in the Western District of Oklahoma, the decision of the court below is "thus not supported by the grounds assigned for it, and should" be reversed by this court (*House* v. *Mayo*, 65 S. Ct., at page 521.)

*House v. Mayo, 324 U. S. 42.

Moreover it should be observed that the holding of the district court that the questions urged in the petition had been fully considered and fairly determined against Rea in the trial under the indictment in the District Court of the Western District of Oklahoma is inconsistent with the statement of the trial court in the same order that Rea had failed to raise any constitutional question during said trial under the indictment. The latter statement of the trial court is palpable error. It is a violent assumption of fact that is not supported by any inference that may be drawn from the petition. The statement should be disregarded as wholly unsupported by the record.

Even assuming *arguendo* that Rea had waived these objections in the district court at the trial under the indictment by failure to complain of the action of that court, yet he would not be precluded from raising constitutional questions upon his petition for writ of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great magnitude they cannot be waived by failure to object even if Rea was represented by counsel. If the questions are such that they can be considered on a petition for writ of habeas corpus they cannot be waived because of failure to object at the trial. *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031, 1038.

Thus the failure to object to the excessive sentence in the case of In re *Bonner,* 151 U. S. 242, 257; to the deliberate use of perjured testimony in *Mooney* v. *Holohan,* 294 U. S. 103, 112-113; to the mob domination of a trial in *Moore* v. *Dempsey,* 261 U. S. 86, 91; to the denial of counsel in *Johnson* v. *Zerbst,* 304 U. S. 458, 468; and to the refusal to communicate with counsel in *House* v. *Mayo,* 65 S. Ct. 517, did not preclude the court from considering the merit of the various questions upon the petition for writ of habeas corpus.

The decisions in *United States* ex rel. *Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689, certiorari denied 322

U. S. 744, *United States* ex rel. *Falbo* v. *Kennedy* (CCA-4) 141 F. 2d 689, certiorari denied 322 U. S. 745, and *United States* ex rel. *Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847, are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for induction prevented the armed forces from determining whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders. Since Rea had completed the selective process upon reporting for induction he was in a position to challenge the administrative orders in defense against the indictment charging him with refusal to submit to induction. The denial of this right entitled him to the writ of habeas corpus.

Similarly in *Waley* v. *Johnston*, 316 U. S. 101, the court extended the writ and broadened its scope so as to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (Pp. 104-105)

However, since the statement of the trial court that Rea waived the constitutional questions by failure to raise them at his trial is not supported by the record in this case it is not necessary for this court to decide the question of waiver. Indeed, the petitioner intends to show by evidence upon a hearing of his petition for writ of habeas corpus

that he did not waive any rights on his trial of the indictment and that he did not fail to object to the unconstitutional action of the district court in denying him his rights to challenge the validity of the administrative action in defense to the indictment.

The petition for the writ of habeas corpus in this case is not a substitute for an appeal. The questions urged are not such questions that can be raised only upon appeal. The fundamental objections are such that they can be considered at any time and in a collateral proceeding. The objections urged vitiate the entire proceeding and oust the convicting court of jurisdiction so as to make the sentence subject to collateral attack.

B

There was a denial of petitioner's right to exemption from all training and service by the administrative agency contrary to the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution, which invalidated the indictment, giving no support to the judgment committing petitioner, so as to deprive the convicting court of jurisdiction to sentence petitioner under the Act.

The petition for writ of habeas corpus alleged that the Government had no authority to institute and prosecute the delinquency proceedings against petitioner under the Act because of the illegality of the administrative orders. [1-15] The petition alleged facts bringing petitioner within the scope of the term "minister of religion" appearing in Section 5 (d) of the Act and in the Regulations. (See Joint Brief for Petitioners in the *Smith* and *Estep* cases, Nos. 66 and 292, respectively, October Term 1945, pages 108-109, 131-194.) Moreover, it is apparent that allegations showed that petitioner was exempt from training and service under the Act and Regulations as construed by the opinions of the Selective Service System. (See Appendix to the Joint

Brief for Petitioners in the *Smith* and *Estep* cases, supra, pages 28a-57a, 71a-73a.)

The petition for writ of habeas corpus alleged facts showing the illegality of the administrative action, thus bringing petitioner under the rule laid down in *Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, decided November 6, 1945. In that decision it was held, upon facts weaker than those alleged in the case at bar, that Hull, one of Jehovah's witnesses, had been denied due process of law contrary to the Fifth Amendment to the Constitution by the draft boards' denying him the exemption he claimed from training and service as a minister of religion. Concerning Jehovah's witnesses the court in that decision said: "The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. . . . he is entitled to such exemption if his work brings him within that classification." Inasmuch as the denial of due process in that case was held to be sufficient to establish the illegal restraint of Hull by a director of a CPS camp, by force of the same reason the same illegal action by the administrative agency in this case should prove the illegal restraint of Rea by the warden of the federal correctional institution. Both civil officers claimed custody authority which emanated from the same source, to wit, the Selective Service System.

The holding in *Falbo* v. *United States,* 320 U. S. 549, does not preclude judicial inquiry of the illegal administrative action here asserted. That decision is confined exclusively to the denial of judicial review of such orders to a registrant who has failed to complete the selective process. Judicial review by the Constitutional writ of habeas corpus has been expanded by the Act of Congress. The writ comes in from the outside of delinquency proceedings under the

draft act and goes behind them to inquire into the substance of the cause of restraint and determine "whether they have been more than an empty shell." (*Frank* v. *Mangum*, 237 U. S. 309 at 345, HOLMES, J.)

Neither Congress nor the Constitution imposes any restrictions or conditions as to the time of the illegal restraints precedent to review upon the writ of habeas corpus. Moreover they do not inflict any penalties against the person unlawfully imprisoned by suspending the writ until he has satisfied the ultimate demands of the administrative agency causing the restraint. The prisoner is entitled to a hearing upon the writ at any time when it is shown that he is detained either "by color of the authority of the United States", or "is in custody for an act done or omitted in pursuance of a law of the United States", or "is in custody in violation of the constitution . . . of the United States". (28 U. S. C. Sec. 453) It should be noticed that failure to submit to induction under the Act and Regulations is "an act . . . omitted in pursuance of a law of the United States" within the meaning of the Code.

It has never been questioned that a federal court can by habeas corpus inquire into the legality of the restraint of one imprisoned by a court-martial order. If the court finds that the armed forces do not have jurisdiction because of the failure of the prisoner to be enlisted properly, or refusal to submit to induction, or illegality of the administrative action that forced the prisoner into the armed forces, the petitioner will be discharged from custody. *Ex parte Reed*, 100 U. S. 13; In re *Grimley*, 137 U. S. 147; In re *Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Billings* v. *Truesdell*, 321 U. S. 542; *United States* ex rel. *Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States* ex rel. *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *United States* ex rel. *Beye* v. *Downer* (CCA-2) 143 F. 2d 125.

In *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, it was held that the prisoner was entitled to discharge under the

writ of habeas corpus, although restrained by a court-martial decree, where it appeared that the draft board did not comply with the Regulations in classifying him as liable for induction. In the *Ver Mehren* case, supra, "The court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other words, after the petitioner had actually been convicted by court-martial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance."—Ex parte *Stewart,* 47 F. Supp. 410.

In the habeas corpus proceedings instituted by petitioner it was the duty of the court to inquire into the want of authority of the draft boards to set in motion the delinquency proceedings under the Act. If they had no jurisdiction then the convicting court had no jurisdiction. Their action in excess of their authority by ordering a minister of religion to do training and service vitiated the subsequent proceedings resulting in the imprisonment of petitioner. The respondent acquired custody over petitioner by virtue of the Act and the Regulations. So also, under the Act, a prison keeper for the armed forces acquires jurisdiction over an inductee who defies the orders of the military authority. It is the administrative agency created by the Act and functioning under the Regulations which sets in motion the chain of events that results in the imprisonment of the minister of religion whose claim for exemption has been ignored. In either case the want of authority on the part of the agency defeats the claims of the prison keeper to custody of the prisoner.

It is said by Judge Yankwich in *Ex parte Stewart,* 47 F. Supp. 410, that there is a "need for a competent authority to question the possible arbitrariness of a board" and that the need "is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution

resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance, —which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the doctrine of limited sovereignty, which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process. (See Yankwich, *The Constitution and the Future,* Ch. III) . . .

"Suppose he stands convicted. Would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penitentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is: Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. *One may raise the question of due process after conviction.* But a person need not wait until then." (Yankwich, J., in *Ex parte Stewart,* 47 F. Supp. 410) (Italics added)

"In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective Service Board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct his writ to the Commanding

Officer. Nor does he have to risk conviction, desertion or court-martial." (*Ex parte Stewart,* 47 F. Supp. 410, at page 414.) See also the opinion of the district court in *Goodwin* v. *Rowe,* 49 F. Supp. 703.*

The Government concedes that if petitioner had submitted to induction he could have obtained judicial review of his claim for exemption and the illegal action of the administrative agency in rejecting it. Even if he defied the military authority and was sentenced to prison by court-martial he still could challenge the authority of the administrative agency and show the illegality of the order to submit to induction. Indeed it has been held that if he submitted to army routine voluntarily after induction he would have waived his right to review by habeas corpus. (*Mayborn* v. *Heflebower,* CCA-5, 145 F. 2d 864, certiorari denied 65 S. Ct. 1087) *A fortiori,* if defiance of the military authority after induction does not preclude judicial review by writ of habeas corpus, then defiance of the administrative agency by refusing to submit to induction does not preclude similar judicial review by writ of habeas corpus in behalf of one imprisoned under the criminal sanctions clause of the Act for such refusal to submit to induction. The indictment and judicial proceedings thereunder have no stronger armor to resist the writ of habeas corpus than do the court-martial proceedings. The writ penetrates both to reach the vulnerable arbitrary order of the administrative agency that precipitated the attack against the prisoner. The writ of habeas corpus should have been granted and the petitioner discharged. If it is not made available to selectees under such circumstances then the people shall be left at the mercy of administrative agencies for granting their liberty. In such event the courts will have been made impotent and to stand as empty shells and monuments of a more liberal and enlightened age.

*But see *Biron* v. *Collins* (CCA-5) 145 F. 2d 758 reversing *Collins* v. *Biron,* 56 F. Supp. 357.

Conclusion

This Court should exercise its discretionary jurisdiction and grant the writ of certiorari prayed for in the petition, and the judgment of the court below should be reversed so as to correct the errors complained of here as committed by the courts below against petitioner and the Constitution of the United States.

HAYDEN C. COVINGTON

Counsel for Petitioner

INDEX

	Page
Statement	1
Discussion	4

CITATIONS

Cases:	
Adams v. *United States ex rel. McCann*, 317 U. S. 269	4
Bowen v. *Johnston*, 306 U. S. 19	4, 5
Bowles v. *United States*, 319 U. S. 33	8
Estep v. *United States*, Nos. 66 and 292, this Term, decided February 4, 1946	5, 6, 7
Falbo v. *United States*, 320 U. S. 549	4
Johnson v. *Zerbst*, 304 U. S. 458	5
Statute:	
Act of July 20, 1892, as amended (28 U. S. C. 832)	6

685785—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 830

ROYAL WAYNE REA, PETITIONER

v.

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

STATEMENT

It appears from petitioner's petition for a writ of habeas corpus that he is a Jehovah's Witness whose claim to classification as a minister of religion was denied by the selective service boards. He was classified I–A and on June 27, 1944, he was ordered to report for induction. Petitioner reported to the induction station and was found acceptable for military service. He refused, however, to submit to induction. (R. 3–6.)

Petitioner was thereafter indicted in the United States District Court for the Western District of

Oklahoma in one count charging that he willfully refused to submit to induction, in violation of Section 11 of the Selective Training and Service Act (R. 17–19). At his trial he offered in evidence his draft board file and oral testimony to the effect that he was a minister of religion. The trial court rejected the offers and thereafter instructed the jury that petitioner's selective service classification was not open to challenge in the criminal prosecution. (R. 10–11.) Petitioner was convicted and on September 30, 1944, he was sentenced to imprisonment for three years (R. 12). On the same day, he filed a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit (R. 12). He failed, however, to cause the record of the trial to be settled and he failed to file an assignment of errors or a bill of exceptions (R. 12). On January 6, 1945, the United States Attorney moved to dismiss the appeal for lack of prosecution and on January 10, 1945, the motion was granted and the appeal was dismissed (R. 12).

On March 27, 1945, petitioner filed a petition (R. 1–15) for a writ of habeas corpus in the United States District Court for the Eastern District of Texas, in which he alleged the foregoing facts and that he was illegally imprisoned by respondent. The petition alleged that there is no evidence to support the selective service boards' denial of his claim to exemption from military

service as a minister of religion (R. 8–9); that the boards had discriminated against him in favor of clergymen of other denominations (R. 9–10); that he was not permitted fully to present his evidence to the local board (R. 4–5); that the order to report for induction was void and the criminal prosecution therefore "illegal, a nullity and void" (R. 2–3, 13); and that "the judgment and commitment are void because upon the trial petitioner was denied the right of trial by jury and his right to prove any substantial defense to the indictment," in violation of his constitutional rights (R. 3).

The district court entered an order on March 27, 1945, denying the petition without granting petitioner a hearing or requiring an answer from respondent. The order (R. 19–20) recites that the petition was denied "for the reason that it is being attempted to be used for the purpose of an appeal and to re-try the issues of fact and law which were tried by the United States District Court in Oklahoma."

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the order of the district court was affirmed (R. 28). In an opinion by Judge Sibley (R. 25–27), the court held that the rulings of the trial court refusing to permit petitioner to challenge the validity of the induction order in his criminal trial, if erroneous, were reviewable only by appeal and that habeas corpus "is

not a remedy for errors committed in the trial" (R. 26). In respect of petitioner's contention that the induction order was void and that the convicting court therefore had no jurisdiction to punish disobedience of such an order, the court held, relying on the then accepted meaning of *Falbo* v. *United States,* 320 U. S. 549, that "the impropriety of the Board's order, as touching such an exemption as this, cannot be made a defense to such a prosecution" and "much less can it avail to deliver him from imprisonment under a conviction, for then the detention is under the court's sentence and not under the Board's order" (R. 27).

DISCUSSION

1. To the extent that the petition for a writ of habeas corpus is predicated on the theory that the convicting court erred in rejecting petitioner's evidence calculated to show invalidity in the induction order and in instructing the jury that it could not consider the propriety of petitioner's selective service classification, we agree with both courts below that petitioner ought not to be permitted to use the habeas corpus procedure to inquire into the very same questions which were open to him on his abandoned appeal from the conviction just a few months earlier. See *Bowen* v. *Johnston,* 306 U. S. 19, 23–27; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 274. There can be no question that upon the face of

the record in the convicting court the indictment charged an offense cognizable by that court and that the court had jurisdiction of petitioner. Likewise it is plain that the asserted errors complained of by petitioner, while of a serious character, were shown by the record of the criminal trial and would have been open for consideration by the Circuit Court of Appeals for the Tenth Circuit on petitioner's appeal if he had perfected it and by this Court on certiorari, if necessary.[1] Thus, in a very real sense, petitioner seeks to use the writ of habeas corpus as a substitute for the appeal which he failed to prosecute to a final conclusion.

We recognize that the rule against permitting the writ of habeas corpus to do service for an appeal "is not one defining power but one which relates to an appropriate exercise of power." *Bowen* v. *Johnston,* 306 U. S. 19, 27. But in this case petitioner points to nothing which justifies a departure from the ordinary rule. It appears from the petition for a writ of habeas corpus that petitioner was represented by counsel at the

[1] In this respect the case is unlike the line of cases illustrated by *Johnson* v. *Zerbst*, 304 U. S. 458, in which the question raised in the habeas corpus proceeding was one which was *dehors* the record in the criminal case and, therefore, presumably was not open to a direct attack by appeal. That an appeal would have afforded petitioner full opportunity to challenge the rulings and instructions of the trial court is illustrated by *Estep* v. *United States*, Nos. 66 and 292, at the present term of this Court, decided February 4, 1946, and the numerous lower federal court decisions cited in the opinions in that case.

criminal trial; that he filed a notice of appeal; that he was allowed almost three months to file a bill of exceptions and assignment of errors; that none was ever filed; and that the appeal was thereafter dismissed by the circuit court of appeals for lack of prosecution, apparently upon a showing that petitioner was not prepared to go forward with the appeal. While petitioner alleges that he was without funds at the time of his appeal (R. 12), there is no suggestion that he or his counsel were unfamiliar with the Act of July 20, 1892, as amended (28 U. S. C. 832), which permits an indigent defendant to proceed in forma pauperis or that he was denied leave to proceed in forma pauperis on the appeal. Petitioner had ample opportunity to challenge the alleged trial errors and he failed to avail himself of that opportunity. That failure, in our view, furnishes no basis for, in effect, taking a second appeal by resorting to habeas corpus.

2. The second aspect of petitioner's contention—that if he was illegally classified the induction order was void and the entire judicial proceeding was likewise void—presents a question which must be examined in the light of the opinion in *Estep* v. *United States,* Nos. 66 and 292, this Term, decided February 4, 1946. The decision of the circuit court of appeals on this question (R. 27) was founded, in part, on the assumption that illegality in a selective service classification is no defense to a criminal prosecution for failing to submit

to induction. Shortly after the decision below, this Court held in the *Estep* case that a defendant in such a prosecution is entitled to show as a defense to the indictment that he was illegally classified. In the course of its opinion, this Court said (slip opinion, pp. 6–8) that "it would seem" that even if the defense were not available in the criminal trial, the way would be open "to challenge the jurisdiction of the local board after conviction by habeas corpus," because the order of the local board was "lawless and beyond its jurisdiction." In discussing the question of the availability of habeas corpus to review the legality of the selective service classification the Court, of course, was not confronted with the factual picture presented by this case. So far as appears from the opinion, the Court did not intend to depart from the established principle of habeas corpus law (see *supra,* pp. 4–6) that a court may, in appropriate circumstances, refuse to convert the writ of habeas corpus into an appeal. As we have shown, the decisions of both courts below were predicated, at least in part, upon this principle. If petitioner had pursued his appellate remedies he would have obtained full review of the very same contentions which he now urges on habeas corpus. For this reason we think that the petition for a writ of certiorari should be denied.

If, however, the Court intended in the *Estep* decision that every registrant who was convicted for failing to submit to induction may test the

legality of his selective service classification by habeas corpus, even though he failed to avail himself of his appellate remedies, then, of course, petitioner is entitled to a hearing and an opportunity to demonstrate that in classifying him the selective service board which finally classified him (*Bowles* v. *United States,* 319 U. S. 33) acted without the authority of the Selective Training and Service Act or the Selective Service Regulations. If the Court intended this, we suggest that the case might well be disposed of in this Court without further briefs or argument by granting the writ of certiorari and reversing the judgment below with instructions that respondent be given an opportunity to answer the petition for a writ of habeas corpus and that such further proceedings shall be conducted as may be proper with respect to the issues raised by the pleadings.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 830

■

ROYAL WAYNE REA, *Petitioner*
v.
A. McDONALD, Warden
of the Federal Correctional Institution
at Texarkana, Texas
Respondent

■

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY
to Respondent's Memorandum

HAYDEN C. COVINGTON
Attorney for Petitioner

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REPLY
to Respondent's Memorandum

MAY IT PLEASE THE COURT:

Respondent attempts to limit the scope of review upon the petition for writ of habeas corpus, notwithstanding the expansion of the historic writ by Congress in the enactment of the Habeas Corpus Act, to grievous errors constituting the denial of due process that are established *de hors* the record. The Government argues that the writ is not available where the errors are apparent from the record. The Government argues that in cases where the errors are apparent of record petition for writ of habeas corpus

is "a substitute for the appeal which he failed to prosecute to a final conclusion." (Respondent's Memorandum, pp. 4-6) The Government's argument entirely ignores the proposition that if the convicting court so far departs from applicable standards of due process of law as to lose jurisdiction, such erroneous departure, even though apparent of record, is uniformly reviewable by the petition for writ of habeas corpus.

The principles announced in *Bowen* v. *Johnston,* 306 U. S. 19, are applicable here. In that case it was stated that if the absence of jurisdiction appeared on the face of the record made in the trial court upon the trial of the indictment, it would be reviewable on a writ of habeas corpus. (*ibid.* p. 26) In that decision it was also said that the general rule, that habeas corpus is not available where the question could be raised upon appeal, is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (*ibid.* p. 27) In the Rea case, at the bar, there was much uncertainty and doubt and confusion at the time of the trial as to the availability of defense to the indictment that such presents unusual circumstances warranting the writ of habeas corpus. (*ibid.* 27)

In *Johnson* v. *Zerbst,* 304 U. S. 458, the court announced a principle and made a holding that is a precedent for the action petitioner requests here. In that decision it is said: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may

obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed —should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" (*ibid.* 468) See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25; *Ex parte Siebold,* 100 U. S. 371, 375.

The denial of a constitutional right contrary to the express commands of the fundamental compact is such an error that is not only reviewable upon appeal but is also subject to review and collateral attack upon a petition for writ of habeas corpus.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process of law. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of MURPHY, J. (See brief for petitioner, *Estep* v. *United States,* No. 292 Oct. Term 1945, pages 85-105.)

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill of attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. (*Cummings* v. *Missouri,* 4 Wall. 277, 320-332; *Kentucky* v. *Jones,* 10 Bush. (70 Ky.) 725.) A judgment rendered upon a trial where there has been a denial of a fundamental constitutional right or due process of procedural law is a nullity and subject to collateral attack, including attack by habeas corpus. *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Old Wayne*

Life Assn. v. *McDonough,* 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.,* 242 U. S. 394, 401; *Griffin* v. *Griffin,* decided February 25, 1946, 14 LAW WEEK 4217, 4218.

If a judge of a federal district court refuses to conduct a judicial trial, as did the judge of the convicting court in this case, and proceeds to cut out all of the defenses and try the case by an illegal theory similar to "trial by ordeal", in violation of the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I, prohibiting bills of attainder, and Article III investing the judicial powers in the courts and not in administrative agencies, then such federal judge *loses jurisdiction* or is ousted of jurisdiction to proceed further and pronounce sentence against petitioner. *Johnson* v. *Zerbst,* 304 U. S. 458, 468. See also *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324 and *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia, November 25, 1945, 14 LAW WEEK 2335-2336.

The fact that the writ of habeas corpus has been broadened so as to reach many different types of violations of procedural due process impels the conclusion that a denial of a judicial trial contrary to the due process clause is equally subject to attack by habeas corpus, which penetrates and goes behind the judgment and reviews the substance of the matter, either on the record or *de hors* the record, regardless of whether there has been an appeal or failure to take an appeal. The following types of errors and inquiries inflicted contrary to the Constitution have been, among many others, reviewed upon the writ of habeas corpus:

(1) Erroneous denial of a plea of former jeopardy, *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Clowans* v. *Rives,* 104 F. 2d 240.

(2) Erroneous reception into evidence a confession obtained in violation of the due process clause by force, etc. *Jones* v. *Kentucky* (CCA-6) (1938) 97 F. 2d 335.

(3) Illegal forcing or obtaining a plea of guilty. *Waley* v. *Johnston,* 316 U. S. 101; *Smith* v. *O'Grady,* 312 U. S. 329.

(4) Proceeding to judgment of guilty after trial dominated by mob violence which could have been complained of at the trial and raised upon appeal. *Frank* v. *Mangum,* 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 91.

(5) Trial by information for a felony contrary to the Constitution, which could have been raised upon appeal. *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1, in which latter case the indictment was amended, without return to grand jury, by the prosecutor.

(6) Denial of trial by jury which could have been raised upon appeal. *Callan* v. *Wilson,* 127 U. S. 540.

(7) Illegal denial of counsel which could have been raised upon appeal. *Johnson* v. *Zerbst,* 304 U. S. 458, 463, 468; *Walker* v. *Johnston,* 312 U. S. 275; *United States ex rel. McCann* v. *Adams,* 320 U. S. 220, 221; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269.

The denial of the right to make any and all valid defenses upon a trial is equal to, if not worse than, a denial of the right to have counsel. The Constitution guarantees both. Without the granting of either, upon request not waived, as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived of the right of counsel, it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses it does him no good to have counsel. If habeas corpus attack collaterally made can reach the denials of one it should reach the other because there is no difference between the two rights. Cf. *United States ex rel. McCann* v. *Adams, supra,* with *Adams* v. *United States ex rel. McCann, supra.* The decision of the United States Circuit Court of Appeals

for the Eighth Circuit in *Manning* v. *Biddle,* 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

The petition for writ of habeas corpus in this case is not a substitute for an appeal. The questions are not such as can be raised only upon appeal. The fundamental objections are such that they can be considered at any time in a collateral proceeding. The objections urged vitiate the entire proceeding and oust the convicting court of jurisdiction so as to make the sentence subject to collateral attack.

Petitioner does not suggest (as does the Government on page 8 of its Memorandum) that, if this court finds a cause for the issuance of the writ is alleged on the ground of a violation of the due process clause by the convicting court, he is entitled to an opportunity in the habeas corpus proceeding to review the illegality of the draft board determination. The proper place for such inquiry was in the convicting court. If the petitioner is discharged by the writ because of a denial of due process by the convicting court then a new trial can be had under another indictment in the United States District Court for the Western District of Oklahoma. In that event it will be unnecessary to pass upon the classification in the habeas corpus proceeding. It is only in event that it is held that there was no denial of due process of law by the convicting court that petitioner desires the court below, in this habeas corpus proceeding, to review the decision of the draft board. Contrary to the Government's suggestion in its Memorandum (p. 8), petitioner says this case should be sent back to the trial court to first decide if there was a violation of the due process of law as alleged by petitioner in the convicting court. If so, the petitioner should be ordered discharged. The court below should be instructed that only in event that it finds there was no violation of due process of law (as alleged in the petition) may it proceed to

a determination of whether the draft board violated the law in classifying petitioner.

Conclusion

WHEREFORE the petition for writ of certiorari should be granted.

HAYDEN C. COVINGTON
Attorney for Petitioner

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APR 6 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 830

ROYAL WAYNE REA, *Petitioner*

v.

A. McDONALD, Warden
of the Federal Correctional Institution
at Texarkana, Texas
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

HAYDEN C. COVINGTON
Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI
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MAY IT PLEASE THE COURT:

To persuade one justice who concurred in the order denying certiorari to desire reconsideration and to aid four members of the Court to determine that the petition for writ of certiorari be granted, this petition for rehearing is filed and presented.

Grounds

1. The Court should have exercised its discretionary jurisdiction because the holding of the court below conflicts

with the former holdings of this Court in habeas corpus cases.

2. The Court should have exercised its discretionary jurisdiction because the court below departed so drastically from the usual and accepted procedure in habeas corpus cases as to call for the exercise by this Court of the power of supervision to halt the same and correct the injustice committed against petitioner.

Discussion

If the time has now been reached for this Court to hold that the petition for writ of habeas corpus is confined only to instances where the denial of the constitutional right can be established *dehors* the record and that it is not available to review the denial of constitutional rights established upon the face of the record and which can be urged upon appeal from a conviction, then such a holding so far departs from the accepted and usual course of judicial proceedings in habeas corpus cases as to justify the granting of the writ of certiorari so as to clarify the law.

If this contention of the Government is applicable and is correct then this Court should explicitly so declare.

If it is not correct then it is unjust to let the decision below stand. Granting certiorari here is necessary to preserve justice and a uniformity in the decisions. It will avoid a multiplicity of actions and appeals to settle the matter now rather than to let it rest obscured in the confusion that results through denial of the petition for writ of certiorari in this case.

It has been uniformly held that failure to take an appeal is not a waiver of the denial of constitutional rights where the deprivation of the rights is sufficient to violate the due process clause. Such denials oust the court of jurisdiction to impose sentence. *Bowen* v. *Johnston,* 306 U. S. 19, 23-25, 26, 27; *Johnson* v. *Zerbst,* 304 U. S. 458, 468.

Whether there has been a denial of due process by the

convicting court in refusing Rea the right to challenge the legality of the administrative order supporting the indictment is a sufficiently substantial question to require the granting of the writ of certiorari. (*Estep* v. *United States,* 66 S. Ct. 423, concurring opinions of MURPHY, J. and RUTLEDGE, J.) The petitioner urges that he has been denied due process of law upon the trial so as to oust the convicting court of jurisdiction to impose sentence. The decision of the courts below that there was no denial of due process is in direct conflict with the decisions of this Court. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457. Cf. *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944.

The judgment of conviction imposed against petitioner upon his trial, where there has been a denial of a fundamental constitutional right to due process of procedural law, is a nullity and subject to collateral assault, including attack by habeas corpus. The decisions of the courts below that the judgment of conviction is not subject to collateral attack are directly in conflict with *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough,* 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.,* 242 U. S. 394, 401; *Griffin* v. *Griffin,* 66 S. Ct. 556, 560.

It is respectfully submitted that the decision of the court below is in direct conflict with *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Ex parte Hans Nielsen,* 131 U. S. 176, 184-185; *Waley* v. *Johnston,* 316 U. S. 101; *Smith* v. *O'Grady,* 312 U. S. 329; *Frank* v. *Mangum,* 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Ex parte Wilson,* 114 U. S. 417; *Ex parte Bain,* 121 U. S. 1; *Callan* v. *Wilson,* 127 U. S. 540; *Walker* v. *Johnston,* 312 U. S. 275; *United States ex rel. McCann* v. *Adams,* 320 U. S. 220, 221; *Adams*

v. *United States ex rel. McCann,* 317 U. S. 269; *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324; *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia, Nov. 25, 1945, 14 L. W. 2335-2336; *Clowans* v. *Rives,* 104 F. 2d 240; *Jones* v. *Kentucky* (CCA-6) 97 F. 2d 335; *Manning* v. *Biddle,* 14 F. 2d 518; *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

In *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185, the error of the court in permitting a trial by information rather than by indictment was apparent of record and could have been raised upon appeal. This was also true in *Ex parte Bain* (1887) 121 U. S. 1, where the defendant was convicted under an indictment amended without return to the grand jury. In each decision the writ of habeas corpus was held to be available despite the right to raise these questions upon appeal, which was not resorted to.

The denial of trial by jury in *Callan* v. *Wilson,* 127 U. S. 540, could have been presented upon appeal. Also the error of the court in denying trial by jury was apparent of record. Nevertheless the writ of habeas corpus was granted.

The illegal denial of counsel is apparent of record: Moreover the denial of counsel can be raised upon appeal. Nevertheless the courts have uniformly held that the writ of habeas corpus is available to discharge a prisoner who has been convicted without counsel contrary to the due process clause. *Johnson* v. *Zerbst,* 304 U. S. 458, 468.

In every one of the above cases the error of the court was considered to be grave and serious. The errors were not mere procedural errors. They violated the fundamental law of the land. The judgment in each case had been obtained contrary to the Constitution so as to make the conviction subject to collateral attack.

If there has been a denial of due process in the manner claimed by petitioner, such can be considered at any time in collateral habeas corpus proceedings. The denial of a hearing contrary to the due process clause vitiates the

entire proceedings and ousts the convicting court of jurisdiction, making the sentence void and subject to collateral attack. These are substantial questions.

It is highly unjust to let the issues stand without determination.

Although there are several thousand of Jehovah's witnesses in prison, only a very few, probably not more than twenty, are in a position like Smith and Estep which should enable them to assert the denial of due process. Most of Jehovah's witnesses now incarcerated are there because of their failure to report for induction into the armed forces. In almost every case there has not been a completion of the selective process. Under the circumstances the granting of certiorari in this case would not unduly burden the courts. Furthermore, the mere inconvenience of the courts in hearing petitions for writs of habeas corpus is not sufficient ground for approval of the illegal restraint of citizens convicted in violation of the due process clause. Only those men who stand in the position of Smith and Estep and who have exhausted their administrative remedies are in a position to contend that they are being held in violation of the due process clause. Men who have been convicted for failure to complete the selective process are not in a position to assert a violation of the due process clause.

This petition for writ of certiorari presents grave questions. Grounds for the granting of the petition are to be found in the language of the *Estep* opinion itself: "But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow. . . . But the fact that *habeas corpus* after conviction is available in these cases gives added support to our reading

of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again." (66 S. Ct. 423, 428-429)

It should be remembered that the court below held that petitioner "could not defend at his trial on the ground that the local board had no jurisdiction". Therefore petitioner asserts that "the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus.*"

"It is true that after conviction of the defendant in the *Falbo* case, his petition for a writ of *habeas corpus* was denied. 141 F. 2d 689. And in a like situation *habeas corpus* was denied in advance of the trial. Albert *v.* Goguen, 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of *habeas corpus* followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See Bowen *v.* Johnston, 304 U. S. 19; Ex parte Williams, 317 U. S. 604; Ex parte Hawk, 321 U. S. 114. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end." (See Note 17, page 8, slip opinion, *Estep* v. *United States,* 66 S. Ct. 423, 428-429)

Conclusion

WHEREFORE, petitioner prays that, upon consideration hereof, the order heretofore denying certiorari be vacated and set aside and an order be entered granting certiorari as prayed for in the petition for writ of certiorari.

ROYAL WAYNE REA, *Petitioner*

By HAYDEN C. COVINGTON, *His Counsel*

Certificate

I, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner